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IN THE

Supreme Court of the United States

October Term, 1970

LEE EDWARDS ..... *Petitioner*

v.

LEM C. BRYAN, RECEIVER FOR ARKANSAS LOAN AND THRIFT CORPORATION ..... *Respondent*
HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, AND CHARLES R. GARNER, parties to original District Court action, and parties to companion cases in Circuit Court of Appeals for the Eighth Circuit, consolidated therein for trial ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FINES F. BATCHELOR, JR.
411 Main (P. O. Drawer L)
Van Buren, Arkansas 72956
Telephone: (501) 474-6371
Attorney for Petitioner

YOES PTG. & LITHO. FORT SMITH, ARKANSAS

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Under Arkansas Law, as was true under the weight of Federal Court decisions, prior to Erie R. Co. vs. Tompkins Rule, and under Federal statutes now, an equity receiver stands in no better position than the one for whom he is appointed, but takes such property subject to all defenses and infirmities which existed in the hands of the one for whom the receiver was appointed 21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Lee Edwards, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the action between the above parties, in which Lem C. Bryan, Receiver for Arkansas Loan and Thrift Corporation was appellant, and Lee Edwards and the other respondents, except Ernest A. Bartlett, Jr., Hoyt Borum, Afton Borum, and E. M. Clem who were appellants and the receiver appellee, were appellees,

the same being Civil actions nos. 19,815, and 19,875 to 19,880, consolidated for hearing, with the specific action in which Lee Edwards was a party being action no. 19,877. Judgment in such action was entered and rendered November 30, 1970, and rehearing denied January 8, 1971.

REPORTED COURT OPINIONS

The original order appointing Lem C. Bryan as receiver for Arkansas Loan and Thrift Corporation, and the other corporations in Action No. FS-68-C-9 in the United States District Court for the Western District of Arkansas, Fort Smith Division, is not reported, but the original order of March 14, 1968, together with the amendment thereto on the same date are set out in full in the appendix hereto as Exhibit A at appendix page 1a. The original judgment of the United States District Court for the Western District of Arkansas, Fort Smith Division, is not reported, but a copy thereof is set out in full in the appendix hereto as Exhibit B at appendix page 7a. The opinion of the United States Court of Appeals for the Eighth Circuit in this matter is not yet reported, as of the date of preparation of this Petition, but said opinion is set out in full in the appendix hereto as Exhibit C at appendix page 12a.

GROUNDS FOR JURISDICTION OF THIS COURT

The judgment sought to be reviewed was rendered and entered by the United States Court of Appeals for the Eighth Circuit on November 30, 1970.

On January 8, 1971, rehearing was denied herein by the United States Court of Appeals for the Eighth Circuit, and issuance of the mandate was stayed for a period of 30 days, providing, however, that if within 30 days Certificate of the Clerk of the United States Supreme Court be filed reflecting the filing of Petition for Certiorari and the record herein, that such stay continue until final disposition by the United States Supreme Court.

This Court has statutory jurisdiction of this matter under the provisions of 28 U.S.C. 1254.

QUESTIONS PRESENTED ON REVIEW

The holding of the United States Circuit Court of Appeals for the Eighth Circuit that the substantive law applicable to this case, an Equity Receivership, is the "Federal Common Law" or "Federal Rules of Decision", rather than the substantive law of the State of Arkansas, is in conflict with the decisions of this Court, the statutory law, and the decisions of the Fifth and Nineth Circuits.

By reversing the decision of the jury in the District Court action, on appeal and entering judgment against the appellee, Lee Edwards, for $70,400.00, where a fact question exists as to the capacity of the person holding the note, for whom he was serving as agent at the time he received and held the notes in question, and other fact questions relative to the question of liability upon the note in question, deprives Lee Edwards of a jury trial guaranteed by Amendment VII to the Constitution of the United States, and further deprives him of property without due process of law,

a right guaranteed to him by Amendment V to the Constitution of the United States.

E. M. Clem was not, as a matter of law, the agent of Arkansas Loan and Thrift Corporation in holding the notes in question, nor is he, by reason of being president of Savings Guaranty Corporation, nor Savings Guaranty Corporation by reason of Arkansas Loan and Thrift Corporation owning stock of said Savings Guaranty Corporation either the agent of, or the same corporation as Arkansas Loan and Thrift Corporation.

Under Arkansas law, as was true under the weight of Federal Court decisions, prior to Erie R Co. v. Tompkins Rule, and under Federal Statutes now, an equity receiver stands in no better position than the one for whom he is appointed, but takes such property subject to all defenses and infirmities which existed in the hands of the one for whom the receiver was appointed.

Arkansas being a modified Uniform Commercial Code state, the requisites for validity of commercial paper and respective rights of the parties would be determined under the Arkansas Modified Uniform Commercial Code.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

The following constitutional provisions, treaties, statutes, ordinances and regulations, or so many as are

involved herein, are hereafter set out and are set out verbatim in Exhibit E hereto at appendix page 37a:

UNITED STATES CONSTITUTION

Amendments V and VII

UNITED STATES STATUTES

15 U.S.C. 77e(a)

15 U.S.C. 77q(a)

15 U.S.C. 77t(b)

15 U.S.C. 77v(a)

28 U.S.C. 959(b)

28 U.S.C. 1652

ARKANSAS STATUTES

Ark Stats 66-2206

Ark Stats 66-2030

Ark Stats 66-4101

Ark Stats 85-3-302

Ark Stats 85-3-306

STATEMENT OF THE CASE

This action is ancillary to the case, Securities and Exchange Commission v. Arkansas Loan and Thrift Corporation, United Loan and Investment Company, Savings Guaranty Corporation, each Arkansas Corporations, and Ernest A. Bartlett, Jr., Hoyt Borum and Afton Borum, individually, in the United States District Court for the Western District of Arkansas, Fort Smith Division in civil action numbered FS-68-C 9, filed March 11, 1967 under the provisions of 15 U.S.C.

77t(b), and in said Court under the provisions of 15 U.S.C. 77v(a), making allegations that said corporations and individuals had been and would continue to violate the provisions of 15 U.S.C. 77e(a) and 15 U.S.C. 77q(a), and that said corporations were insolvent, further praying injunction to restrain such activities and appointment of receiver to conserve the assets of such corporations.

March 14, 1968, Lem C. Bryan was appointed receiver for said corporations by said Court in such action, qualified as such, and in June 1968, instituted this action as receiver of Arkansas Loan and Thrift Corporation upon the notes in question, which were then in the registry of the Court under protective order without prejudice to the rights of any party or singer, the order being set out in full in the appendix hereto as Exhibit D, appendix 32a.

For the purpose of identification and brevity, hereafter reference will be made to Securities and Exchange Commission as SEC; Arkansas Loan and Thrift Corporation, an Arkansas business corporation incorporated during the latter part of 1964 as AL&T; United Loan & Investment Company, an Arkansas corporation authorized under an Arkansas law in 1937 to offer evidences of indebtedness to the public, as UL&I; Savings Guaranty Corporation, an Arkansas corporation, authorized under the Arkansas Insurance Laws to be a surety company or insurer. Ernest A. Bartlett, Jr., Chairman of the Board of Director of AL&T, and its chief executive officer from 1965 until approximately December, 1967, and a trustee (the designation given the members of the governing body of SG instead of director) of SG until after the re-

ceivership was set up, will be referred to as Bartlett. Hoyt Borum was president of SG from 1965 until June 1967, and a director of AL&T thereafter. Afton Borum was a director of AL&T and trustee of SG from 1965 until the receivership, and president of AL&T for the last few months prior to the receivership. Mr. Lem Bryan, the appointed, qualified and serving Receiver will hereinafter be designated Receiver.

Lee Edwards first became connected with AL&T and its businesses in the spring of 1965, when he purchased a portion of his stock in the corporation, and additional stock was purchased by him during the summer of 1965, and shortly thereafter he was notified he had been elected to the board of directors of AL&T. He became a trustee of SG in the fall of 1965, and resigned from both corporations in July, 1968, after the receivership. Mr. Edwards attended a large portion of the directors' and trustees' meetings of the organizations, but as president and manager of AAA Lumber Co., Inc. of Van Buren, Arkansas, and Bentonville, Arkansas, which position he held them and still holds, it was impossible for him to attend all meetings.

Except for some 225 shares of stock owned by Louisiana Loan & Thrift Corporation, and 15 shares owned by the trustees and one or two other persons, AL&T owned all of the remainder of the 1,080 shares of stock authorized in SG, still held certificates therefor and carried the stock on its books as an asset, from prior to January 1, 1967, and the same was true on the date the Receiver took over its records, and was true at the time of trial of the case.

AL&T in its name and that of its wholly owned

subsidiary, UL&I, received thrift accounts upon which it paid higher rates of interest than local financial institutions were paying, and SG issued surety insurance on the accounts desired up to $25,000.00. With January, 1967, came a new governor for the State of Arkansas, and a new administration, and about the same time the Banking Department and the Insurance Departments of Arkansas started causing some problems to AL&T and SG, which finally resulted in litigation, none of which was terminated adversely to AL&T or SG prior to the receivership herein. Bartlett attributed the difficulties to the new administration and to dissatisfaction by the banking association and savings and loan association, on a state level because of the volume of business being received by AL&T, and due to the open actions of the state banking and state savings and loan organizations, together with the timing, the implication appeared reasonable.

Much discussion and consideration of the possibility of a run upon AL&T for cash was discussed and possible solutions considered. Upon the representation to Lee Edwards that a plan had been worked out for the trustees of SG, who were, for the most part also directors and stockholders of AL&T, to sign notes, in blank, except for the amount of $70,400.00 and AL&T the payee, to be held by Mr. E. M. Clem who was represented to be neither a director nor officer of AL&T and this understood by Edwards to be true, for the signers, but to be delivered to AL&T if there were a run upon it for cash and it assigned first real estate mortgages to the persons who had signed the notes, with all signers to both bear a pro rata share of the obligation, and receive a pro rata share of the security. The note or notes would then be sold to local banks for

cash to meet the rust. Lee Edwards' note in such amount was easily convertable to cash at that time, and he believed the other notes to likewise be easily convertable.

Mr. Edwards signed his note with only the amount and payee listed thereon sometime during the summer of 1967, and delivered it to Mr. Clem to hold for him and deliver to AL&T only upon the contingency before set out. Mr. Edwards did not see the other persons sign their notes, but based upon the sworn testimony, it occurred some months later at a time when Edwards was not present, and at the time it appears that the others also endorsed an incomplete stock certificate, but Edwards had no knowledge of this nor did he have knowledge that his note had had added to it some matter concerning stock certificates, nor did he authorize any such addition.

Edwards did not know that a purported stock certificate reciting that it represented 64 shares of SG stock had been attached to his note, nor did he know that the assignment on said certificate purported to contain his signature until this suit was commenced and summons served upon him with complain and a photo copy of the purported note and certificate attached. Edwards at all times denied knowledge of such certificate and further continually denied that the purported signature on the stock certificate was his signature, and after his deposition had been taken and he continued such denial, the Receiver employed a handwriting expert to examine the purported signature, and upon trial the Receiver stipulated that the purported signature of Lee Edwards on the stock cer-

tificate was a forgery, upon advise of the handwriting expert.

At the trial of this matter, basically the matter hereinbefore set out appeared in evidence. After the notes had been delivered to Mr. Clem to hold for the signers, there was no run upon AL&T for cash prior to the receivership, and no first mortgages offered for the notes in question. The records of AL&T reflected that it still had all shares of stock, and retained the certificates reflecting same, in SG at the time of the receivership that it had on January 1, 1967, that the purported notes of June 15, 1967 herein sued upon were not shown as an asset of AL&T, SG, or any other corporation in volved herein, nor did the records of AL&T reflect that any such notes were in existence, although the receiver did find an unsigned note in such amount in favor of AL&T for the signature of L. T. Davis.

The first actual knowledge the Receiver had of the notes herein sued upon was on or about May 7, 1968, when they were deposited in the registry of the Court by order, without prejudice to the rights of any party or signer, the complete order appearing as Exhibit D hereto at appendix page 32a and that the notes in question remained in the registry of the Court until the night prior to the hearing in this matter, at which time the District Court directed them delivered to he Receiver for he purpose of having them available in Court for trial.

The Receiver testified that he had given nothing of value for the purported notes herein, nor did he have any record of AL&T reflecting that anything had been

given, of value, or otherwise for the notes, and the opinion of the 8th Circuit does not reflect that it found any consideration given therefor.

All witnesses who testified on the point testified that Mr. Clem was not an officer or director of AL&T at the time he received the notes in question or at any time thereafter, and there is no claim that he delivered the notes to AL&T or anyone for it. Depositions of Bartlett, Hoyt Borum, Afton Borum and E. M. Clem, were used, and introduced against them at the time of trial of this action which appear to be contradictory with reference to the purpose for which the notes were give and whether these four considered the notes as valid obligations, but Edwards was not a party to such litigation, given any notice of such taking, represented or present at the taking of such depositions and objected to them as each was offered for introduction, on such basis.

There were introduced in evidence, over objections of Lee Edwards, various papers purporting to be unsigned copies of minutes of AL&T which reflected that E. M. Clem was a director of AL&T at the time he received the notes in question, the last of the purported minutes having been furnished to the Receiver some six months after his appointment after the taking of a deposition.

Upon trial of this matter, instructions were given by the Court with no objection to the instruction relative o delivery of the purported notes, although objections were made by receiver as to the Court's instruction with reference to estoppel. The jury returned a verdict in favor of Lee Edwards and the Receiver

appealed to the United States Circuit Court for the Eighth Circuit, and it is from such decision reversing the jury verdict and judgment of the District Court that this Petition for Wri of Certiorari comes.

ARGUMENT

THE HOLDING OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT THAT THE SUBSTANTIVE LAW APPLICABLE TO THIS CASE, AN EQUITY RECEIVERSHIP, IS THE "FEDERAL COMMON LAW" OR "FEDERAL RULES OF DECISION", RATHER THAN THE SUBSTANTIVE LAW OF THE STATE OF ARKANSAS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, THE STATUTORY LAW, AND THE DECISIONS OF THE FIFTH AND NINETH CIRCUITS.

In its decision herein, the Eighth Circuit holds that the case is controlled by the "federal common law" or "federal rule of decisions", rather than the laws of the State of Arkansas, because this is a Federal Equity Receivership, growing out of an injunction action by the SEC, in which the allegation is made that three corporations and the three named individuals, none of whom are Lee Edwards, are in violation of the Securities and Exchange Act, praying an injunction, and upon the further allegation of insolvency, prays appointment of a receiver. The Securities and Exchange Act does not provide for appointment of a receiver, therefore, this is not a statutory receivership, but rather is an Equity Receivership.

This Court has clearly held that there is no "federal common law" or "federal rule of decision" in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 SCt, 817, 82 LEd. 1188, 114 ALR 1487 (1938), where it stated:

> "Except in matter governed by the Federal Constition or by Acts of Congress, the law to be applied *in any case* is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to a State whether they be local in their nature of 'general,' be they commercial law or a part of the law of torts. And no clause of the Constitution purports to confer such a power upon the federal courts." 304 U.S. 64, 78. (emphasis supplied)

In the Erie Case, this Court further cited, with approval, the language of Mr. Justice Field in his protesting in *Baltimore & O. R. Co. v. Baugh,* 149 U.S. 368, 401, 37 LEd. 772, 786, 13 SCt. 914, where he stated:

> "I am aware that what has been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But not-

withstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reinterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States which recognizes and preserves the autonomy and independence of the States — independent in their legislative and independent in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence." 304 U.S. 64, 78, 79, 82 LEd. 1188, 1194, 1195.

Congress has, also, spoken on this matter, establishing the same rules, and states as follows:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in the courts of the United States, in cases where they apply. 28 U.S.C. 1652.

A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. 28 U.S.C. 959.

The same rules apply to equity cases as law cases, relative to the application of the substantive law of the State, and has been well settled since prior to *Hawkins v. Barney,* 5 Pet. 457, 8 LEd. 190, and was again affirmed in both *Mason v. United States,* 260 U.S. 545, 43 SCt. 200, 67 LEd 396, which was cited with approval in *Erie R. Co. v. Tompkins, supra.*

The cases appear to be without exception, prior to the instant case, that the various Circuits follow the *Erie Rule,* except in the instant case, and two of the cases in point are *Helen Curtis Industries, Inc. v. Pruitt,* 5th Circuit 1967, 385 F2d 841, 848, which states:

> . . . "It is well settled that a federal court uses the substantive law of the state in which it sits . . ."

which is also reflected in the 9th Circuit in a 1967 case of *Riess v. C. W. Murchison,* 384 F2d 727.

The 8th Circuit takes the position that *D'Oench, Duhme & Co. v. F.D.I.C.,* 315 U.S. 477, 62 SCt. 676, 86 LEd. 477 (1942), revives the old "Federal Common Law" or "Federal Rules of Decision", so clearly laid to rest by *Erie R. Co. v. Tompkins, supra,* but we are unable to find such intrepretation. Both *D'Oench* and *Deitrich v. Greaney,* 309 U.S. 190, 60 SCt. 480, 84 LEd. 694 (1940) are cases arising out of the *Federal Reserve Act,* 12 *U.S.C.* 264 *et seq. of* 1933, an act to regulate the operation, and particularly the assets and solvency of banks insured under such act. In these two cases, this Court held only that a note given for the purpose of violation of the intent of this valid Congressional Statute and purposes for which it was enacted and therefore the valid Congressional enactment controls. In the *Deitrich case,* a promissory note was given for the purpose of "hiding" the fact that the bank was

purchasing its own stock, in violation of the criminal sanctions of the *Federal Reserve Act,* and this Court held that one could not set up as a defense to a suit upon a note in a bank under the Federal Reserve Act, his own criminal violation of such act. In *D'Oench,* the note was given to "hide" worthless investments of the bank so it would appear to have more assets than it actually had. While the note was given before the enactment of the *Federal Reserve Act,* it was given for the purposes of deceiving others, including such as the Federal Reserve Board, and after the bank was insured by the Federal Reserve Board, interest was reflected as paid and the note was, in violation of civil and criminal sanctions of the *Federal Reserve Act* pledged to the Federal Reserve Board as a part of the security for a loan of $1,000,000.00. In each of the cases, the specific note was used for the purposes of violating and deceiving those charged with the enforcement of a valid enactment of the United States Congress, to-wit, the *Federal Reserve Act.* In the instant case, there is no such use of said purported notes, nor is there a Congressional enactment providing that a direct action by such receiver is an action "arising under the laws of the United States" as does the *Federal Reserve Act* in 12 U.S.C. 264 (j) Fourth.

Since the receiver in the instant case was authorized by his appointing order to ". . . institute, . . . such actions or proceedings in state or federal courts as in his opinion be necessary or proper . . .", Exhibit A, Appendix page 1a at page 3a, therefore, if we are to follow the decision of the 8th Circuit, we will have one rule of law applying to our case, if the Receiver had elected to file the suit in State court, and another if he elected to file the suit in Federal court, again falling

into the situation condemned by this Court in the *Erie Case, supra.*

BY REVERSING THE DECISION OF THE JURY IN THE DISTRICT COURT ACTION, ON APPEAL, AND RENDERING JUDGEMENT AGAINST THE APPELLEE, LEE EDWARDS, FOR $70,400.00, WHERE A FACT QUESTION EXISTS AS TO THE CAPACITY OF THE PERSON HOLDING THE NOTE, FOR WHOM HE WAS SERVING AS AGENT AT THE TIME HE RECEIVED AND HELD THE NOTES IN QUESTION, AND OTHER FACT QUESTIONS RELATIVE TO THE QUESTION OF LIABILITY UPON THE NOTE IN QUESTION, DEPRIVES LEE EDWARDS OF A JURY TRIAL GUARANTEED BY *AMENDMENT VII* TO THE *CONSTITUTION OF THE UNITED STATES,* AND FURTHER DEPRIVES HIM OF PROPERTY WITHOUT DUE PROCESS OF LAW, A RIGHT GUARANTEED TO HIM BY *AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES.*

Jury trial was duly requested and granted in this action, the matter tried to a jury and instructions by the Court given, with no objection to the instructions relative to "delivery" of the purported notes in question given by the Court.

The depositions of Ernest A. Bartlett, Hoyt Borum, Afton Borum, and E. M. Clem, taken in action FS 68-C9 were admitted in evidence in this action, without restrictive instructions, over the objections of Edwards, since he was not a party to that action, was given no notice of the taking of such depositions, nor

represented at the taking of such depositions. These items were admitted as a part of the examination of each of these witnesses, called as hostile witnesses by the plaintiff. Any statements made by such deponent in any of such depositions would not be admissible as substantive proof against Lee Edwards. *Rule* 26(*d*), ***Federal Rules of Civil Procedure.***

E. M. Clem denied, on oath, at the trial of this action that he was an officer or director of AL&T at the time he received the Edwards note, or thereafter, but that he held it as agent for Edwards, (A. 338, 339) which was supported by the sworn testimony of Lee Edwards, (A. 340). All other witnesses who testified, testified to the same facts, to-wit, that Clem was neither an officer or director of AL&T when he received the notes in question or at any time thereafter, although he was President of SG, but held the respective notes as agent for the makers respectively. Unsigned minutes purporting to be the minutes of AL&T, some of which were delivered to the receiver some 5 to 6 months after his appointment reflect the contrary, but witnesses explain that he attended AL&T directors' meetings only as an observer on behalf of SG, to determine what is happening.

Whether Clem was, in fact, the agent of the respective makers of the notes, in holding them, or the agent of AL&T, is a fact question, and the proof viewed most strongly in favor of the Receiver, who was the appellant herein, reflects a disputed fact question, and since the credibility of evidence and effect or weight thereof cannot be decided on a motion for a directed verdict, but must be determined by the jury, a jury question was presented herein and no directed verdict could

validly be entered. *Grepke v. General Elec. Co.,* (CA Ind. 1960) 280 F2d 508, cert. denied 364 U.S. 899, 81 SCt. 232, 5 LEd2d 193. A jury question having been presented, it is a violation of *Amendment VII to the United States Constitution* to deprive Lee Edwards of such jury trial, and he is therefore deprived of property, by reason of such judgment, without due process of law, which is required by *Amendment V to the United States Constitution.*

E. M. CLEM WAS NOT, AS A MATTER OF LAW, THE AGENT OF ARKANSAS LOAN AND THRIFT CORPORATION IN HOLDING THE NOTES IN QUESTION, NOR IS HE, BY REASON OF BEING PRESIDENT OF SAVINGS GUARANTY CORPORATION, NOR SAVINGS GUARANTY CORPORATION BY REASON OF ARKANSAS LOAN AND THRIFT CORPORATION OWNING STOCK OF SAID SAVINGS GUARANTTY CORPORATION EITHER THE AGENT OF, OR THE SAME CORPORATION AS ARKANSAS LOAN AND THRIFT CORPORATION.

Although there is a commingling of officers of two corporations with identical stockholders in both corporations, a corporation is an entity separate and distinct from its stockholders and from other corporation with which it may be connected, and even though the president of one of the corporations is also the president of the other corporation, and that president commences and completes a civil suit against the other corporation that he is president of and obtains judgment one against the other, the judgment is valid in the absence of fraudulent conduct on the part of one of the officers who procures the judgment. *G. W. Jones Lumber Co.*

v. Wisarkana Lumber Co., 125 Ark. 65, 187 SW 1068 (1916) nor is a parent corporation liable for the debts of its subsidiary merely because the parent corporation holds the controlling interest or because the two are managed by the same officers. *Rounds & Porter Lumber Co. v. Burns,* 216 Ark. 288, 225 SW2d 1 (1950).

AL&T and SG are both corporatis organized and incorporated under the laws of the State of Arkansas, AL&T as a Business Corporation, and SG as an Insurance, or Surety Corporation, duly qualified, and being separate corporations, are, in fact, separate persons or entities, even though they may have had some of the same persons as stockholders, directors, and officers, and in acting for one of the corporations, the individual is not also acting for the other corporation at the same time, as a matter of law, but may act for each independently of his actions for the other. Neither is there anything in the law of agency in the State of Arkansas that prohibits one person acting as agent for more than one person, but only he is required to act in good faith toward his principal or principals *McHaney v. McHaney,* 209 Ark. 337, 121 SW2d 886, 162 ALR 1175.

While we respectfully submit that E. M. Clem was not an agent for AL&T, and the jury so found under instructions to which no objection was made, even had he been also an agent for AL&T, there is no showing of any conflict between the interests of AL&T and the respective signers of the purported notes in question, because the signers were only interested in the purported notes not being delivered to AL&T until proper assignment of first real estate mortgages and notes were assigned, and certainly, AL&T had no right to obtain the purported notes without complying with the

agreement, and the record reflects that Mr. Clem did not breach his trust or duty by making an unauthorized delivery of the notes to AL&T, nor did he destroy them to keep them from being available, but, under protective order of the District Court, deposited them in the registry of the District Court, as ordered, without prejudice to the rights of any party or signer, a copy of such order of deposit being set out in the Appendix hereto as Exhibit D, appearing at Appendix page 32a. It might be noted that under Arkansas Law, a person is not prohibited from serving as agent for persons with opposing interests, so long as such fact is fully disclosed to both parties and the utmost good faith to each principal is exhibited. *City National Bank v. McCann,* 193 Ark. 967, 106 SW2d 195 (1937); *Georgia Home Ins. Co. v. Bennett,* 134 Ark. 52, 203 SW 279 (1918).

An "agent" is . . . "A person authorized by another to act for him, one entrusted with another's business." *Hinson v. Culbertson-Stowers Chevrolet, Inc.,* 244 Ark. 853, 427 SW2d 539 (1968), the possession by an agent of something belonging to his principal, would be the possession of the principal and not some third person. Since Mr. Clem was the agent of Lee Edwards so far as the note signed by him was concerned, Lee Edwards never parted with possession of said note, and there was no delivery to AL&T, or any other person on behalf of it.

Under Arkansas Law, the same principals of agency apply to banking corporations as apply to individuals, *City National Bank v. McCann, supra.*

UNDER ARKANSAS LAW, AS WAS TRUE UNDER THE WEIGHT OF FEDERAL COURT

DECISIONS, PRIOR TO *ERIE R. CO. v. TOMPKINS RULE,* AND UNDER FEDERAL STATUTES NOW, AN EQUITY RECEIVER STANDS IN NO BETTER POSITION THAN THE ONE FOR WHOM HE IS APPOINTED, BUT TAKES SUCH PROPERTY SUBJECT TO ALL DEFENSES AND INFIRMITIES WHICH EXISTED IN THE HANDS OF THE ONE FOR WHOM THE RECEIVER WAS APPOINTED.

Arkansas law with reference to the rights of an equity receiver, even in actions upon notes by its officers to a banking corporation which later becomes insolvent, are no greater than the rights of the bank, had it not become insolvent. *Jordon v. Harris,* 98 Ark. 200, 135 SW 830 (1911) states:

> The equity " . . . receiver stands in the place of the bank whom he represents, and has only such right as it had, 'so that the rights of third parties are not increased, diminished, or varied by his appointment.' " . . .
>
> " . . . to enable a banking corporation to maintain an action on a note made to it there must be a consideration at the time of making the contract."

A receiver of an insolvent bank is not an assignee for a valuable consideration of notes held by the bank, and by operation of law, the rights and property of the bank passes to him precisely in the same condition and subject to the same equities as the bank that held them. *Funk & Son v. Young,* 138 Ark. 38, 210 SW 143, 5 ALR

(1919); *Futrall v. McKennon,* 187 Ark. 374, 59 SW2d 1035 (1933).

Federal Statutory Law, relative to receivers generally reflects that the receiver holds and manages the property in the same manner as the owner or possessor would be bound to do or wound have been bound if he were in possession thereof, with the valid laws of the State in which such property is located applying. 28 U.S.C. 959.

Case law on the same proposition prior to the *Erie Decision, supra,* is expressed in *George C. Rankin, Receiver v. City National Bank of Kansas City, Missouri,* 208 U.S. 541, 52 LEd, 610, 28 SCt. 346 (1908) and *Detitrick v. Standard Surety & Casualty Co.,* (1st Circuit 1937) 90 F2d 862 where it was held that a receiver acquires no greater right than those of the estate to which he has succeeded, and cannot prevail unless the original owner of the estate could have prevailed had there been no receivership, with knowledge of all facts he knew affecting the character of the claim. This same principal was expressed by the 8th Circuit in *East v. Crowdus,* 302 F2d 645 (1962).

In the instant case, AL&T knew that no consideration had been given for the notes in question, that the contingency upon which the notes were to be delivered, if proper security furnished, and that Mr. Clem still held the notes until the happening of such contingencynd delivery of security. AL&T further knew that it still held every share of SG stock it had held prior to Mr. Clem receiving the notes, carried the same amount on its books, held the same certificates, had

given up nothing for the notes, did not reflect any of said notes as an asset on any of its books or records, and did not have said notes in its possession. It further knew that no person had changed their position by reason of such notes so held by Mr. Clem, and that he and all other persons who had signed the notes delivered them to Mr. Clem to hold for them because he was not then, or thereafter, an officer or director of AL&T, but was president of SG and attended AL&T director meetings only as an observer for SG who had a large portion of its deposits insured.

The Arkansas Insurance Code, Ark. Stats. 66-2001 et seq, does not prohibit one corporation holding stock in another, nor does it prohibit interlocking ownership or management, but such activities are specifically permitted by Ark. Stats. 66-3020, set out in full in Exhibit E, appendix page 42a.

The only limitations on the types of insurance that can be written by a company who has otherwise qualified is that a life insurance company may write no other type insurance except disability insurance, a reciprocal insurer may not write life insurance and a title insurance company must be a stock company, Ark. Stats. 66-2206, set out in Exhibit E, appendix page 41a.

SG was a duly licensed and authorized Surety Insurer under the laws of the State of Arkansas, and its authority was never revoked prior to the receivership herein. As a Surety Company, it had the authority to write surety bonds or contracts for any person. Ark. Stats. 66-4101, set out in Exhibit E at appendix page 42a.

ARKANSAS BEING A MODIFIED UNIFORM COMMERCIAL CODE STATE, THE REQUISITES FOR VALIDITY OF COMMERCIAL PAPER WOULD BE DETERMINED UNDER THE ARKANSAS MODIFIED UNIFORM COMMERCIAL CODE.

Any interest which the Receiver might claim in the purported notes in question herein, could only have come to him by reason of his taking over an estate of AL&T or one of the others in the original receivership action, therefore, we should look to the Arkansas Version of the Uniform Commercial Code.

Ark. Stats. 85-3-302, set out in full, with a portion of the committee notes in Exhibit 7 at appendix page 43a, provides that one who acquires a negotiable instrument by taking over an estate, as this receiver did, and the committee notes specifically reflect that such a type of estate is intended, the receiver cannot become a Holder in Due Course, and therefore under *Ark. Stats.* 85-3-306 set out in full in Exhibit E at appendix page 44a, such notes are subject to all defenses a party would have available in an action on a simple contract, or the defense of want of failure of consideration, nondelivery, delivery for a special purpose and other defenses.

Since, under the Arkansas version of the Uniform Commercial Code, the Receiver is not a holder of the purported notes in question in due course, then even if it were conceeded that he were a holder, which it is not, then the admitted defense of failure of consideration constitutes a complete defense in this action to the claim of the receiver.

CONCLUSION

The decision of the 8th Circuit herein is contrary to the holding of this Court in *Erie R. Co. v. Tompkins, Supra,* 28 U.S.C. 1652, 28 U.S.C. 959, *Helen Curtis Industries, Inc. v. Pruitt,* from the 5th Circuit, *supra,* and *Riess v. C. W. Murchison,* from the 9th Circuit, *supra.* Each of these specifically hold that there is no "Federal Common Law" or "Federal Rules of Decision" to be applied by Federal Common Law" or "Federal Rules of Decision" to be applied by Federal Courts, but rather the law of the State where the Court sits applies as the substantive law, in the absence of Federal Constitutional, Statutory or Treaty establishing the substantive law to be followed. The 8th Circuit in this case has held that "Federal Common Law" or "Federal Rules of Decision" control this equity receivership established by the District Court as incidental relief granted upon petition alleging violation of the *Securities and Exchange Act* by three corporations and three of their officers, not including Lee Edwards, and prayer for receiver to conserve assets based upon additional allegation of insolvency.

The 8th Circuit has, erroneously this petitioner respectfully submits, attempted to reinstate the *pre-Erie doctrine* because the original jurisdiction of a Federal Court was based upon an allegation of violation of the *Securities and Exchange Act* by persons other than this petitioner, and with reference to a note which was never known of outside of those who knew its limitations and had nothing to do with the alleged securities violations, and the fact that the receiver is an officer of a Federal Cour. This decision is based by the 8th Circuit upon its intrepretation of *D'Oench,*

Duhme & Co. v. F.D.I.C., supra, and *Deitrich v. Greaney, supra.* These cases are decided in complete accordance with the *Erie Doctrine,* because they turn on wilful violation of the *Federal Reserve Act,* holding that the sanctions for such wilful acts are not alone criminal, but that they will not be permitted to set up such intentional action as a defense to notes given for the purpose condemned by such act, to-wit, to hide a bank purchasing its own stock on loans from the bank, or permitting a note, good on its face, to be used as part of the security for a $1,000,000.00 loan from the Federal Reserve System.

Amendment VII to the United States Constitution guarantees Lee Edwards the right to jury trial in this matter, there being more than $20.00 in contraversy, and since jury trial was seasonably demanded and received, the setting aside of the jury verdict and directing a judgment against Lee Edwards, where there is a jury question presented, deprives him of this right and also of property without due process of law granted to him by *Amendment V to the United States Constitution.*

Based upon the Arkansas Law, applicable herein, the Receiver herein is in no better position that would AY&T have been to have attempted to maintain this action, and it not being a holder in due course, the defense of no consideration for the note, and delivery only to Mr. Clem, as agent for Lee Edwards to be delivered to AL&T only upon contingencies which never occurred, and which note was never delivered to AL&T, but was placed in the registry of the Trial Court, without prejudice to the rights of any party or signer, constituted a complete defense herein, and the Trial

Court's instructions being a true statement of law, the judgment in favor of Lee Edwards should be affirmed.

This petitioner respectfully prays that this Court review this case and bring it in line with this Court's devision in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 SCt. 817, 82 LEd. 1188, 114 ALR 1487, by requiring that the jury verdict in the Trial Court be affirmed.

Dated, Van Buren, Arkansas,
January 28, 1971

Respectfully submitted,

FINES F. BATCHELOR, JR.
411 Main (P. O. Drawer L)
Van Buren, Arkansas 72956
Telephone: (501) 474-6371

Attorney for Petitioner

(Appendix and Exhibits Follow)

APPENDIX

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF ARKANSAS

Civil Action File No. FS-68-C9

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*	
v.	
ARKANSAS LOAN & THRIFT CORPORATION, an Arkansas corporation	**ORDER**
SAVINGS GUARANTY CORPJRATION, an Arkansas corporation	**APPOINTING**
UNITED LOAN & INVESTMENT COMPANY, an Arkansas corporation	**RECEIVER**
ERNEST A. BARTLETT	
HOYT BORUM	
AFTON BORUM ..... Defendants	

This cause came on to be heard on Plaintiff's Motion for Preliminary Injunction and Appointment of a Receiver, and the Court having granted said motion by its order of March 13, 1968, which order stated that the appointment of a Receiver is appropriate in the circumstances,

IT IS ORDERED:

(1) That Lem C. Bryan be and he hereby is appointed receiver of the defendants, Arkansas Loan & Thrift Corporation, Savings Guaranty Corporation and United Loan & Investment Company, and of all the properties of the said defendants, real and personal, of whatever kind and description;

(2) That the said receiver forthwith file with the clerk of this court a bond in the sum of $25,000.00 with sureties to be approved by the court, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and properties which may come into his hands and abide by and perform all things which he shall be directed to do;

(3) That until the further order of this court the said receiver be and he hereby is authorized forwith to take and have complete and exclusive control, possession and custody of all the assets and property of the defendants;

(4) That the said defendants and any persons acting under their direction shall upon presentation of a certified copy of this order deliver to the receiver any and all properties of the defendants, real or personal, in their possession or under their control; and that all persons are enjoined from in any way disturbing the possessions of the receiver and from prosecuting any actions which affect the property of said defendants;

(5) That the said receiver be and he hereby is authorized to continue, manage and operate the business of the defendants, until the full order of this court, with full authority to carry on, manage and operate the said business, to buy and sell merchandise, supplies or stock in trade for cash or on credit and as may be deemed advisable by such receiver;

(6) That the said receiver be and he hereby is authorized in his discretion to employ such managers, agents, employees, servants, accountants, and attorneys

as may in his judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendants and of the assets thereof, and that said receiver be and he hereby is authorized to make such payments and disbursements as may be needful and proper for the preservation of the properties of the defendants, including the authority to make payments of debts entitled to priority;

(7) That said receiver be and he hereby is authorized to receive and collect any and all sums of money due or owing to the defendants in any manner whatsoever, whether the same are now due or shall hereafter become due and payable, and said receiver be and he hereby is authorized to do such things and enter into such agreements in connection with the management care and preservation of the properties of the defendants as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the said properties;

(8) That the said receiver be and he hereby is authorized to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the protection, maintenance and preservation of the assets of the defendants or the carrying out of the terms of this order, and likewise to defend, compromise or adjust or otherwise dispose of any or all actions or proceedings instituted against him as receiver or against the defendants and also to appear in and conduct the defense of any suit or adjust or compromise any actions or pro-

ceedings now pending in any court by or against the defendants where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of the said receiver be advisable or proper for the protection of the properties of the defendants.
Dated: March 14, 1968

John E. Miller

United States District Judge

U.S. District Court

Western Dist. Arkansas

FILED

March 14, 1968

E. A. Riddle,
Clerk

By Marian Heimner
Deputy Clerk

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF ARKANSAS

Civil Action File No. FS-68-C-9

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*	)
v.	)
ARKANSAS LOAN & THRIFT CORPORATION, an Arkansas corporation,	)
SAVINGS GUARANTY CORPORATION, an Arkansas corporation,	) ORDER
UNITED LOAN & INVESTMENT COMPANY, an Arkansas corporation,	)
ERNEST A. BARTLETT,	)
HOYT BORUM ..... *Defendants*	)

Earlier today the court entered an order appointing Lem C. Bryan as receiver of the defendants Arkansas Loan & Thrift Corporation, Savings Guaranty Corporation, and United Loan & Investment Company. In paragraph numbered (3) of said order, the court erroneously ordered and authorized the receiver "forthwith to take and have complete and exclusive control, possession and custody of all the assets and property of the defendants."

The paragraph numbered (3) of said order should be and is amended to provide that the receiver is authorized "forthwith to take and have complete and exclusive control, possession and custody of all the assets and property of the defendants Arkansas Loan

& Thrift Corporation, Savings Guaranty Corporation, and United Loan & Investment Company."

The paragraph numbered (4) of said order should be and is amended by adding after the world "defendants" in line four of said paragraph the following: "Arkansas Loan & Thrift Corporation, Savings Guaranty Corporation, and United Loan & Investment Company."

Dated the 14th day of March, 1968.

John E. Miller
United States Senior District Judge
Sitting by Designation

U.S. District Court
Western Dist. Arkansas

FILED
March 14, 1968
E. A. Riddle,
Clerk
By Marian Heimner,
Deputy Clerk

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

LEM C. BRYAN, RECEIVER OF ARKANSAS LOAN AND THRIFT CORPORATION ..... *Plaintiff*

v. Civil No. FS-68-C-35

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MICHLER, LEE EDWARDS, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, CHARLES R. GARNER and L. T. DAVIS .... *Defendants*

JUDGMENT

The above entitled cause was tried to a jury on May 13 to May 16, 1969, and on May 16, 1969, the jury returned the following verdicts:

> "We, the jury, find the issues in favor of the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, and against the defendant, Ernest A. Bartlett, Jr.
> 5/16/69 /s/ DAVID M. PORRITT
> Date Foreman"

> "We, the jury, find the issues in favor of the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, and against the defendant, E. M. Clem.
> 5/16/69 /s/ DAVID M. PORRITT
> Date Foreman"

> "We, the jury, find the issue in favor of the plaintiff, Lem C. Bryan, Receiver of Arkansas

Loan and Thrift Corporation, and against the defendant, Afton Borum.
5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, and against the defendant, Hoyt Borum.
5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the defendant, Gaylord B. Roberson, and against the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation.
5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the defendant, Paul A. Michler, and against the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation.
5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the defendant, Lee Edwards, and against the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation.
5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the defendant, Ralph C. Ingram, and against the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation.
5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the defendant, Joe D. Jeryo, and against the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation.

5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

"We, the jury, find the issues in favor of the defendant, Charles R. Garner, and against the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation.

5/16/69 /s/ DAVID M. PORRITT
Date Foreman"

The verdicts were filed and the court ordered that entry of judgment be withheld until further direction of the court.

Now, on this day, pursuant to the verdicts returned by the jury as set out above and in accordance therewith,

IT IS ORDERED AND ADJUDGED that the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, have and recover of and from the defendant, Ernest A. Bartlett, Jr., the sum of $70,400.00 on the note in question, together with interest thereon at the rate of 7% per annum from February 20, 1968, to May 27, 1969. Plaintiff's attorneys' fee is fixed at $750.00 and plaintiff shall recover from defendant, Ernest A. Bartlett, Jr., said amount in addition to the $70,400.00 above adjudged. Plaintiff shall also recover interest on the total amount of $71,150.00 at the rate of 6% per annum from the date of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, have and recover of and from the defendant, E. M. Clem, the sum of I70,400.00 on the note in question, together with interest thereon at the rate of 7% per annum from February 20, 1968, to May 27, 1969. Plaintiff's attorneys' fee is fixed at $750.00 and plaintiff shall recover from defendant, E. M. Clem, said amount in addition to the $70,400.00 above adjudged. Plaintiff shall also recover interest on the total amount of $71,150.00 at the rate of 6% per annum from the date of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, have and recover of and from the defendant, Afton Borum, the sum of $70.400.00 on the note in question, together with interest thereon at the rate of 7% per annum from February 20, 1968, to May 27, 1969. Plaintiff's attorneys' fee is fixed at $750.00 and plaintiff shall recover from defendant, Afton Borum, said amount in addition to the $70,400.00 above adjudged. Plaintiff shall also recover interest on the total amount of $71,150.00 at the rate of 6% per annum from the date of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation, have and recover of and from the defendant, Hoyt Borum, the sum of $70,400.00 on the note in question, together with interest thereon at the rate of 7% per annum from February 20, 1968, to May 27, 1969. Plaintiff's attorneys' fee is fixed at $750.00 and plaintiff shall recover

from defendant, Hoyt Borum, said amount in addition to the $70,400.00 above adjudged. Plaintiff shall also recover interest on the total amount of $71,150.00 at the rate of 6% per annum from the date of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall recover from said defendants, Ernest, A. Bartlett, Jr., E. M. Clem, Afton Borum and Hoyt Borum, all his costs herein expended.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff shall recover nothing from the defendants, Gaylord B. Roberson, Paul A. Michler, Lee Edwards, Ralph C. Ingram, Joe D. Jeryo and Charles R. Garner, and the complain in this cause as to them is dismissed.

This May 27, 1969.

/s/ PAUL X WILLIAMS

United States District Judge

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,815

LEM C. BRYAN, RECEIVER,
Appellee,

v.

ERNEST A. BARTLETT, JR.,
AFTON BORUM, HOYT BORUM,
and E. M. CLEM ..... *Appellants*

Nos. 19,875 to 19,880

LEM C. BRYAN, RECEIVER,
Appellant,

v.

GAYLORD B. ROBERSON, et al.,
Appellees

Appeal from the United States District Court for the Western District of Arkansas.

[November 30, 1970.]

Before GIBSON and LAY, Circuit Judges, and HUNTER, District Judge.

GIBSON, Circuit Judge.

This is the third reported federal appeal in the financial affairs of the Arkansas Loan & Thrift Corporation, an Arkansas corporation.[1] The case involves a suit by Lem C. Bryan, the receiver[2] of AL&T against nine directors and the attorney of that corporation to recover payment on promissory notes executed by them in favor of AL&T. The defendant directors asserted the defenses of no delivery, lack of consideration, failure to have possession of the notes at the time suit was filed, and that the notes were incomplete. The receiver in turn contends that they are estopped to assert these defenses. The facts of the controversy are somewhat complicated, necessitating a detailed resume.

Arkansas Loan & Thrift Corporation was organ-

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[1] The prior published reports include *Securities and Exchange Commission v. Arkansas Loan & Thrift Corporation,* 294 F.Supp. 1233 (W.D. Ark. 1969), aff'd, sub nom., *Securities and Exchange Commission v. Bartlett,* 422 F.2d 475 (8th Cir. 1970); *Securities and Exchange Commission v. Arkansas Loan & Thrift Corp.,* 297 F.Supp. 73 (W.D.Ark. 1969), aff'd, 427 F.2d 1171 (8th Cir. 1970).

[2] Under 28 U.S.C. §754 receivers "shall have capacity to sue in any district without ancillary appointment." This suit was brought by the receiver in the court of his appointment, upon a cause of action which he was entitled to bring, and the defendants were subject to the jurisdiction of the court. It is thus ancillary to the main suit, and jurisdiction is properly vested in the district court, regardless of diversity of citizenship or the amoun in controversy. *White v. Ewing,* 159 159 U.S. 36 (1895); *Gibson v. Vinton,* 21 F.2d 168 (8th Cir. 1927); *United States v. Lewis,* 338 F.2d 187 (6th Cir. 1964); 7 *Moore, Federal Practice* 66.07 [3].

ized to engage in consumer financing; it also sold securities and evidences of indebtedness ("thrift accounts") to the general public. Savings Guaranty Corporation was acquired by AL&T for the purpose of insuring its deposits. As of the time of the acquisition, AL&T owned a majority of Savings Guaranty's stock, 780 of the 1080 outstanding share of stock. Savings Guaranty's assets, in turn, consisted primarily of an assignment from AL&T of all of its assets. While there were some insignificant changes in personnel from time to time, for all practical purposes during the period of their joint operation the managers and directors of both corporations were the same persons. AL&T in other words was insuring itself.

In March 1968, the Securities and Exchange Commission filed suit in the Western District of Arkansas against both corporations, seeking an injunction against further corporate activity because of violations of the Securities Act of 1933, alleging that they had used the mails to sell securities not registered with the Commission (15 U.S.C. 77e(a) and 77e(c)) and had used the mails to sell securities by fraudulent means (15 U.S.C. § 77q(a)). The suit also alleged that the corporations were insolvent and sought the appointment of a receiver. The trial court granted a temporary injunction and appointed a receiver to conserve assets. It subsequently became clear that the corporations were hopelessly insolvent, and the receiver was given the authority to liquidate the assets.

Among the items which came into the receiver's possession were the ten notes sued upon in this suit. Each note was dated June 15, 1967, made payable to the order of Arkansas Loan & Thrift, in the amount

of $70,400 to carry 7 per cent interest, secured by 64 shares of stock in Savings Guaranty Corporation, and was signed by a defendant. Attached to each not was a stock certificate in the amount of 64 share of Savings Guaranty stock made out in the name of each defendant and, with one exception, endorsed by him. These notes were never carried on the books of AL&T as an asset.

It is of some importance to indicate how the receiver came into possession of these notes. The notes were dated June 15, 1967, but it is not at all clear when they were actually executed. There does seem to be agreement among the directors that they were all executed at the same time. But one of them testified that they were executed in December 1967, others said January or February of 1968, while others seemed to think it was sometime earlier than anq of those dates. In any event, it is undisputed that at the time they were executed they were given into the possession of E. M. Clem, and that at the time he received possession of the notes Clem was president of Savings Guaranty. Whether he was also at that time a director of AL&T is uncertain. The record shows that he was a director of AL&T at least until January 15, 1968, and does not show that he at any time resigned that position. Clem himself testified that he was not a director of AL&T in February of 1968 and that was the approximate time he received possession of the notes. This testimony is in conflict with others who asserted that the notes were executed and given to him earlier. Pursuant to the order of the court directing all records of AL&T and Savings Guaranty be turned over to the receiver, Clem deposited these notes in the court registry.

Several other documents came into the receiver's

possession which are of interest in this case. One was a stock option plan dated November 1, 1966, executed by AL&T, which granted each director of Savings Guaranty the option to purchase 65 shares of its stock owned by AL&T at a price of $1,100 per share, the option to expire June 30, 1967. The minutes of the meeting of the board of directors of Savings Guaranty for June 5, 1967, indicated that each director intended to exercise his option. The stock ledger of Savings Guaranty also showed that each director had been transferred 64 shares of stock from the holdings of AL&T. However, there appear to have been no canceled certificates or stock stubs showing this transfer.

In July 1967, the Insurance Commissioner of Arkansas became concerned about the solvency of Savings Guaranty and about the possibility that there was such an interlocking ownership of AL&T and Savings Guaranty that AL&T was in effect insuring itself. He ordered a hearing with a view to determine whether or not Savings Guaranty's authority to operate as a guaranty company should be revoked. The hearing was held in August 1967, attended by four of the present defendants, at which time a memorandum was introduced in evidence which showed the ownership of 65 shares of Savings Guaranty stock in each of the present defendants.

It also appears from the record that at least three of the defendants represented to the SEC in depositions that the notes in question represented personal obligations to AL&T for the purchase of Savings Guaranty stock.

The defendants' explanations of the reasons for executing the notes in controversy were neither consistent nor satisfactory, but all denied receiving any consideration for them. Some contended that the notes were executed for the purpose of completing the stock option transaction, but that the stock was never delivered. Others suggested that the notes were to bolster the assets of AL&T. Others suggested that they were to get the companies out of difficulty with the authorities in Little Rock. Still others suggested that the notes were to be negotiated by AL&T in the event that a run on the deposits occurred, in which case the makers were to be given first mortgages as security, events which never occurred. None of the defendants was able to explain the presence of the stock certificates attached to the notes and endorsed by them. In addition, all of the defendants contended that the notes were never delivered to AL&T.

The receiver contends that the defendants are estopped to assert any of these defenses to liability on the notes.

At the outset we are confronted with the question of what law governs the issues in this case. The defendants strenuously insist that the law of Arkansas is applicable, without citing any authority. We find this proposition doubtful. Federal jurisdiction in this case is based, not on diversity of citizenship, but on a federal equity receivership arising from violation of the federal securities regulation statutes. The receiver was appointed in this case to prevent further violations of the federal securities laws and to preserve the assets for the benefit of the investor-creditors of the companies, who are primarily individual citizens of many different

states and whose financial interests were endangered by the securities law violations of the defendants. As Professor Loss points out, "[s]urely this [an SEC receivership proceeding] is an instance of the post-*Erie* survival of a 'federal common law' (in this case, equity)." 3 L. Loss, *Securities Regulation* 1513 n. 113 (1961).

We find no cases directly in point on this issue, but an analogy may be drawn from the case of *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447 (1942). In that case, the F.D.I.C. brought suit on a note which it had acquired as assets as collateral for a loan made to a state bank. The defense of want of consideration was asserted, but the parties could not agree on which state law was to be applied to the transaction, it being alleged that under Missouri law the defense was proper, while under Illinois law the defendant would be estopped to deny liability on this ground. The Supreme Court held that the matter was not a question of state law, but of federal law. There were two reasons for this result. First, the corporation was an agency of the federal government and second, the policy underlying the Federal Reserve Act to protect the assets of public banks from misrepresentation required the questions presented to be determined by federal standards. Here the receiver, while not a federal corporation, is an officer of a federal court appointed because of violations of federal law. The policy underlying the federal Securities Act of 1933 is to protect investors from the fraudulent sale of securities and the common loss of investment which follows from violations of the act. In unsnarling the tangled affairs of these corporations to preserve insofar as possible assets for distribution to the defrauded investors, the receiver is performing a federal function.

These are substantial reasons for applying a federal rule of decision to this case.

Even if the case is deemed to be governed by Arkansas law, we have investigated the law of that state closely and find no conflict with the decision here rendered. The questions involved have not been definitively passed upon by the Arkansas courts, but there are many decisions which are consistent with the result reached by us, and they are cited where appropriate.

We turn now to the substantive problems involved. The first problem is that of delivery. It is a prerequisite to liability on a negotiable instrument that that instrument be delivered by the maker. -The defendants contend that there was no delivery in this case. They argue that Clem held the notes solely as agent for them, that they were never delivered to AL&T, and that the receiver obtained possession only by virtue of a court order which cannot be construed as voluntary delivery. We agree that the transfer from Clem to the receiver cannot be considered to be the sort of delivery requisite to establishing the effectiveness of the notes in question. However, as we construe the facts in this case, the transfer of possession from the defendants to Clem was sufficient to constitute the necessary delivery.

In discussing this question of delivery, as well as the problem of consideration following, it should be kept in mind at all times that the defendants as directors had a fiduciary relationship to the AL&T and its investors. A director's obligation to act in utmost good faith in the operations of a company's business is most

acute in transactions involving personal financial dealings with the company, for it is in these situations that the opportunities are most seriously present for acting, whether willfully or merely negligently, contrary to the interests of those they are supposed to represent.

The purpose of requiring a delivery is to make manifest the intention of the maker of a note that it be operative. Thus, even though a person executes a note in proper form, where he retains possession and control over it, it can reasonably be assumed that he did not intend for it to be effective. *See generally,* 1 *A. Corbin, Contracts* § 32 (1963. "Delivery" is defined in the NIL as a transfer of possession from one person to another (Uniform Negotiable Instruments Law § 191), and in the UCC as a voluntary transfer of possession (Uniform Commercial Code § 1-201 (14). Of course, it is an elementary principle of agency that delivery to a principal's agent is the equivalent of delivery to the principal. *Scolaro v. Bellito,* 184 N.E. 2d 604 (Ohio App. 1962). Where an instrument is no longer in the possession of a party whose signature is on it, there is a presumption of delivery. 11 *Am. Jur.* 2*d, Bills & Notes,* § 272 (1963).

Applying these principles to the instant case, we think it is clear that there was delivery of the notes in question to AL&T and binding instructions to that effect should have been given. The delivery by the defendants to Clem was clearly a voluntary transfer of possession. There is no conflict in the evidence as to that point. It is also clear that this transfer amounted to a relinquishment of control over the instrument. There was never any further attempt by any of the defendants to discover what was being done with

the notes or to insure that they not be used for any purpose which might entail liability on their parts.

We think this delivery to Clem was the equivalent of a delivery to AL&T. While all of the defendants, including Clem, denied that at the time he received the notes Clem was an officer of AL&T, the evidence in the record indicates the contrary. The minutes of AL&T show that he was a director as of January 15, 1968, and there is no showing in the record when he resigned. The defendants testified that the notes were executed at the end of 1967 or the beginning of 1968 (they were dated June 15, 1967, or perhaps earlier, and were delivered to Clem at the time of execution. Even if we were to accept for the purposes of argument that at the time he received the notes, he was no longer a director of AL&T, it still seems to be a clear inference that he was an agent of AL&T. He had been a director of AL&T and remained president of Savings Guaranty Corporation, a company controlled by AL&T. It is evident that in putting the notes in his possession, without any further attempt at control over them, the defendants intended them to be readily accessible to AL&T for any purposes which might be deemed useful. If the defendants truly intended the notes not to be used by AL&T, or to be used for strictly limited purposes, the means were readily available to assure the limited use. They could either have not executed them until the appropriate time, or having executed them retained possession of them, or put them in the possession of a completely independent party with clearly limited instructions and authority. Since none of these things was done, and since it is clear that the defendants intended to relinquish possession and control of the notes to a person intimately associated with AL&T,

the conclusion is inescapable that they were delivered to AL&T.

The defendants have contended that the receiver is not a holder of these notes because he was not in possession of them at the time he filed the suit and that he obtained possession at the time of trial only by virtue of a court order; they argue that, not being a holder, he is not entitled to sue on the notes. There is no merit to this contention, since we have concluded that the notes were delivered to AL&T. Having been delivered to AL&T prior to the receivership, hence rendering it a holder, they passed into the receiver's constructive possession upon his taking control of the property and he is therefore a holder.

Defendants also raise the contention that the notes are unenforceable because they are incomplete, citing Ark. Stat., Ann. § 85-3-115. This is a section of the Uniform Commercial Code which provides as follows:

> "When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed. . . ."

The notes in question were dated June 15, 1967, recited a principal sum of $70,400 at an annual interest rate of 7 per cent to be "payable in equal annual installments of principal and interest in the sum of ..... Dollars each on the 15th day of June, 1968 and on each anniversary date thereafter until said entire indebtedness of $70,400 and interest shall be paid in full." The only incomplete blank on the face of the note was the

amount of the annual installment. We do not believe this renders the note "incomplete in any *necessary* respect." It simply indicates that annual installments were not contemplated and that the entire amount of the note was due one year after the date. *Master Homecraft v. Zimmerman,* 208 Pa. Super 401, 222 A.2d 440 (1966).

We turn now to the issue of lack of consideration and whether or not the defendants are estopped to deny liability on the notes on this ground. The defendants contend that there can be no estoppel in this case because there is no evidence that anyone was ever shown these notes and hence there could have been no misrepresentation by or reliance on the validity of these notes as assets of AL&T. They particularly emphasize the fact that the notes were never carried on the books of AL&T as assets.

It is true that in the ordinary case of equitable estoppel, a party relying on the principle of estoppel must show some reliance on the misrepresentation which led to a detrimental change of position. But the case law shows that this rule has no application in situations involving the giving of a note to a financial institution by an officer, director, or stockholder of that institution. Public policy forbids that such a person, having a fiduciary obligation to the company, deny the validity of an obligation which he has purported to assume for the benefit of the company, regardless of whether or not anyone was affirmatively misled by his conduct. This policy is particularly apposite where the company has become insolvent and the rights of creditors and investors have been endangered.

Early cases involving this problem often spoke, not in terms of estoppel, but in terms of valid consideration. It was held that where notes were given to a bank by a director or stockholder, to cover up bad assets, but were not intended to become personal obligations, there was a valid consideration and they were binding. *See, e.g., Ellis v. Jonesboro Trust Co.,* 179 Ark. 615, 17 S.W.2d 680 (1933); *Merchants & Farmers Bank v. Cardwell,* 174 Tenn. 490, 127 S.W.2d 113 (1939).

Other cases, rather than straining to find a consideration for the note, held that the maker was stopped to assert lack of consideration as a defense where the bank was allowed to carry the note as an apparent asset. Often these cases involved an affirmative attempt to deceive bank examiners as to the solvency of the intsitution. It was held that such a misrepresentation as to bank assets necessarily involved detrimental reliance on the part of the public who dealt with the bank on the faith of the bank's solvency. *See, e.g., Bangor Trust Co. v. Christine,* 297 Pa. 64, 146 A. 545 (1929); *Denny v. Fishter,* 238 Ky. 127, 36 S.W.2d 864 (1931); *Brand v. Korth,* 128 Tex. 488, 99 S.W.2d 285 (1936).

The above cited cases all involve situations where the note was carried as an apparent asset on the bank's books. We are confronted in this case with whether the fact that the notes in question were not carried on the company's books as an asset should make a difference in the application of the doctrine of estoppel. We think it does not. In the first place, notes in the possession of a company, whether carried on its books or not may in fact be assets. In the second place, the defendants in this case were in total control of the books of

AL&T, as well as Savings Guaranty, and the evidence is substantial that principles of sound accounting practices and record keeping were consistently disregarded so that the probative value of the records as to the actual status of the companies was non-existent. The defendants' own accountant testified that "their bookkeeping was very poor and sloppy; they did not follow general accepted accounting principles. . . ." Finally, much of the law in this area indicates that whether or not a note is actually carried on a bank's books or in fact causes any deception is not material to the application of an estoppel to assert the defense of lack of consideration.

One of the leading cases is *Mount Vernon Trust Co. v. Bergoff,* 272 N.Y. 192, 5 N.E.2d 196 (1936). In that case, the defendant, apparently innocently, executed a note to a bank and received in return a writing expressly relieving her from personal liability and looking to some assigned collateral for payment. But when the bank subsequently sued on the note, the New York Court of Appeals held that the collateral agreement was no defense, and it expressly said that whether any deception was intended or achieved by the agreement was not material.

> "We are not told in this case whether the bank examiner was deceived, and indeed we do not know whether any one was deceived. . . .
>
> ". . . The defendant may not have intended to deceive any person, but when she executed and delivered to the plaintiff bank an instrument in the form of a note, she was chargeable with knowledge that for the accommodation of the bank, she was aiding the bank to conceal the actual transaction.

> Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." *Id.* at 197.

The Texas Supreme Court, in a case involving a note given to a trust company by a director which was carried as an apparent asset, held that the note was supported by sufficient consideration because of the defendant's position with the company and also that he was estopped to assert lack of consideration because of the attempted deception. But most significantly for purposes of this case, the court gave an additional reason for its holding which is equally applicable here:

> "Aside from the reasons heretofore advanced, public policy requires that we hold against the contention of the defendants in this case. A person who for the accommodation of a corporation such as we have here, executes an instrument which is in form a binding obligation is estopped from thereafter asserting that the instrument should not be enforced because of want of consideration." *Motor & Industrial Finance Corporation v. Hughes*, 157 Tex. 276, 302 S.W.2d 386, 392 (1957).

Other cases in accord with this position are *O'Keefe v. Equitable Trust Co.*, 103 F.2d 904 (3d Cir. 1939); *Traylor v. Farmers Bank & Trust Co.*, 196 Ark. 161, 116 S.W. 2d 590 (1938); *Blanks v. American Southern Trust Co.*, 177 Ark. 832, 9 S.W.2d 310 (1928).

Professor Corbin has dealt generally with this situation in his treatise as follows:

> "Whether there has been fraudulent intent or not, it would be scandalous not to enforce payment of the note, if otherwise any depositor or creditor would be a loser. Justification for such enforcement can be phrased in terms of 'estoppel' or in terms of the action in reliance by various parties. In any case, there has been no consideration in the sense of a bargained-for equivalent. In some cases the court has been content to rest its decision against the promisor on a mere appeal to the prevailing beliefs as to public policy." 1A *Corbin, Contracts* § 197 (1963).

See also 11 *Am. Jur.* 2*d*, *Bills & Notes* § 243 (1963).

We have left for last discussion of the case which seems clearly dispositive of this issue, *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447 (1942), discussed previously on the issue of what law should apply. The facts of that case were as follows. In 1933, the defendant executed a note to a bank in order that the bank would not have to carry on its books some past due bonds, with the understanding that the note would not be enforced against him, but any payment of the note would be made out of the proceeds of the bonds. In 1934, at a time when the bank was solvent, the F.D.I.C. insured it; at this time the bank carried the note as an asset, although the F.D.I.C. did not necessarily know that. In 1935, while it was still solvent, the bank charged off the asset on its books. In 1938, the bank became insolvent, and the F.D.I.C. made a loan to it to carry on its business, receiving as collateral an assignment of the bank's assets, including the note in question. The Supreme Court held that the maker of the note was estopped to set up the defense of no consideration, and the fact that the note was not carried as an

asset at he ime of its acquisition by the F.D.I.C. did not preclude the application of estoppel.

> ". . . [A]n accommodation maker is not allowed that defense as against the receiver of the bank and its creditors, or at times even against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements. . . .
>
> "Furthermore, the fact that creditors may not have been deceived or specifically injured is irrelevant. . . . [I]t is the 'evil tendency' of the acts to contravene the policy governing banking transactions which lies at the root of the rule.
>
> * * *
>
> ". . . The fact that the note was charged off by the bank subsequent to the time when respondent insured the bank and prior to the time when it acquired the note under the loan is immaterial. A note may be nonetheless an asset though it is charged off. . . . It is indeed clear that at no time prior to the demand for payment did respondent know that the note was not genuine. It needs no argument to demonstrate that the integrity of ostensible assets has a direct relation to solvency. And it is no . . . defense . . . that no damage was shown to have resulted from the fraudulent or unlawful act." *Id.* at 458-461.

This reasoning is equally applicable to this case. Here the defendants delivered notes to AL&T which on their face constituted personal obligations to the company. They were available for the company to use for whatever purposes it saw fit. Even though not carried on the books of the company, they were nevertheless available as assets. And the fact that no specific injury or deception is shown from the use of the notes is no

defense to liability. The "evid tendency" was there. Deception was practiced on a state regulatory official. The public was informed that the investment accounts were guaranteed — the only way any meaningful guarantee could be afforded was by an independent company, not one owned by AL&T, which would then be backing the investments accounts with its own assets. This constituted a fraud practiced on the public and the defendants as fiduciary directors are responsible for this deception and are estopped to deny the validity of the notes. We conclude that the defendants should all be held liable on these notes.

It follows from what we have said that the judgments against Bartlett, Afton Borum, Hoyt Borum and Clem should be affirmed. The judgments in favor of the other six defendants must be reversed because of error in the trial court's instruction No. 10 to the jury. This instruction permitted the jury to find no liability if they found that the defendants had no intention to purchase Savings Guaranty stock, or if they found that the notes had not been delivered to AL&T, or if they found that the defendants had not represented to the Arkansas Insurance Commissioner that they were owners of the Savings Guaranty stock. As noted above, binding instructions should have been given as to delivery. It is no defense to these notes that the defendants did not intend to purchase Savings Guaranty stock, that they received no consideration for the notes, or that no one was specifically deceived by the notes.

Certain additional comments may be made as to defendants Garner and Edwards. Defendant Garner was not a director of either corporation, but he was attorney for both and was intimately connected with

the affairs of both. His fiduciary duties were of the same status as that the the directors. We think the language of the Utah Supreme Court is apt here. "One who aids an officer and director of a bank to violate the law and betray his trust, as was done in this case, is in no position to assert lack of consideration when the bank sues to recover on the note which was knowingly given. . . ." *Bank of Commerce v. Seely,* 23 Utah 2d 271, 462 P.2d 154, 155 (1969). We view Garner as serving in the same fiduciary capacity as the directors and thus estopped from asserting the defense of lack of consideration and any other defenses denied the directors.

Defendant Edwards testified that he executed the note bearing his signature and delivered it to Clem. At the time he executed it, it did not recite that it was secured by Savings Guarany stock, and that was added without his authorization sometime later. The attached stock certificate with his signature is an admitted forgery. However, we do not think this operates to relieve him from liability. In the first place, we attach no significance to the fact that the stock certificates were attached to the notes, except for the fact that they are some indication that deception was the intent of these notes. But the notes could be equally deceptive without the certificates, and the crucial fact here is that the defendants signed and delivered notes representing personal obligations to the company. Since the execution and delivery of the note is admitted, Edwards should be held liable.

The judgments against defendants Bartlett, Afton Borum, Hoyt Borum, and Clem are affirmed. The judgments against the plaintiff and in favor of defend-

ants Roberson, Michler, Ingram, Jeryo, Edwards, and Garner are reversed. Upon the record made, the trial court erred in denying the plaintiff's motion for a directed verdict as to all defendants. The case is remanded with instructions to vacate those judgments entered for the defendants and to enter judgments for the plaintiff. *Federal Savings & Loan Ins. Corp. v. Kearney Trust Co.,* 151 F.2d 720 (8th Cir. 1945).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

Civil Action File No. FS-68-C9

SECURITIES AND EXCHANGE COMMISSION, an Arkansas corporation SAVINGS GUARANTY CORPORATION, an Arkansas corporation UNITED LOAN & INSESTMENT COMPANY, an Arkansas ›rporation ERNEST A. BARTLETT, HOYT BORUM, AFTON BORUM ..... *Defendants*	**ORDER PERTAINING TO TENDER**

Now on this 7th day of May, 1968, came to be heard the tender of the attorney for Savings Guaranty Corporation and Arkansas Loan and Thrift Corporation, of certain installment notes and stock certificates, such defendants being represented by John A. Spinuzzi and the Receiver being in person and represented by John H. Fitzhugh, his attorney and

The Court, after hearing the receiver and counsel for said defendants, is of the opinion that such notes and certificates should be delivered to the United States District Court Clerk for the Western District of Arkansas without prejudice to any of the rights or obligations of said corporations, the receiver or any of the individual signers of said notes, it is

ORDERED, ADJUDGED AND DECREED that the following installment notes and stock certificates

be delivered instantly to the United States District Court Clerk:

1. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Hoyt Borum in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 21 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Hoyt Borum and dated June 15, 1967, and which certificate has been endorsed in blank by Hoyt Borum.

2. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Afton A. Borum in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 22 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Afton A. Borum and dated June 15, 1967, and which certificate has been endorsed in blank by Afton A. Borum.

3. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by E. M. Clem in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 24 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of E. M. Clem and dated June 15, 1967, and which certificate has been endorsed in blank by E. M. Clem.

4. Installment note dated June 15, 1967 in the original principal sum of $70,400, executed by Gaylard B. Roberson in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 25 rep-

ersenting sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Gaylard B. Roberson and dated June 15, 1967, and which certificate has been endorsed in blank by Gaylard B. Roberson.

5. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Paul A. Michler in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 26 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Paul A. Michler and dated June 15, 1967, and which certificate has been endorsed in blank by Paul A. Michler.

6. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Lee Edwards in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 27 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Lee Edwards and dated June 15, 1967, and which certificate has been endorsed in blank by Lee Edwards.

7. Installment note dated June 15, 1967 in the original principal sum of $70,000.00, executed by Ralph C. Ingram in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 28 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Ralph C. Ingram and dated June 15, 1967, and which certificate has been endorsed in blank by Ralph C. Ingram.

8. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Ernest A. Bartlett, Jr. in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 29 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Ernest A. Bartlett, Jr. and dated June 15, 1967, and which certificate has been endorsed in blank by Ernest A. Bartlett, Jr.

9. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Joe D. Jeryo in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 31 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Joe D. Jeryo and date June 15, 1967, and which certificate has been endorsed in blank by Joe D. Jeryo.

10. Installment note dated June 15, 1967 in the original principal sum of $70,400.00, executed by Charles R. Garner in favor of Arkansas Loan and Thrift Corporation with attached stock certificate No. 32 representing sixty-four shares of common stock of Savings Guaranty Corporation, and which certificate is issued in the name of Garner and Parker and dated June 15, 1967, and which certificate has been endorsed in blank by Garner and Parker by Charles R. Garner.

11. Stock certificate No. 23 issued in the name of Charles H. Ritchey, dated June 15, 1967 and representing sixty-four shares of common stock of Savings Guaranty Corporation, and which stock certificate has not been endorsed by Charles H. Ritchey and without any note or other instrument whatsoever attached.

12. Stock certificate No. 34 (which number has been overwritten in ink as No. 33), dated June 15, 1967, issued in the name of Arkansas Loan and Thrift Corporation and representing 150 shares of common stock of Savings Guaranty Corporation which certificate has not been endorsed by the Corporation and without any other instruments whatsoever attached.

It is noted that each of the above-described stock certificates does not bear the corporate seal and each is signed only by Carolyn Johnston without designation of her office.

IT IS FURTHER ORDERED that the delivery to and receipt of such installment notes and stock certificates by the United States District Court Clerk shall no in any way determine or prejudice the rights and obligations of the Receiver, Arkansas Loan and Thrift Corporation, Savings Guaranty Corporation or of any of the persons whose names are endorsed upon or recited in such notes and certificates.

Dated this 7th day of May, 1968.

John E. Miller

United States District Judge

U.S. District Court
Western Dist. Arkansas

FILED
May 7, 1968

E. A. Riddle,
Clerk

By Marguinte Weaver,
Deputy Clerk

EXHIBIT E

VERBATIM LISTING OF CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be . . . deprived of . . . property, without due process of law; . . .

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenth dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES STATUTES

15 U.S.C. 77e(a)

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails o rin interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. 77q(a)

(a) It shall be unlawful for any person in the offer or sale of an securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. 77t(b)

(b) Whenever it shall appear to the Commissioner that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States or United States court of any Terriory, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond . . .

15 U.S.C. 77v(a)

The district courts of the United States, and the

United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commissioner in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any diability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

28 U.S.C. 959(b)

(b) A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress oherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

ARKANSAS STATUTES

Ark. Stats. 66-2206, Vol. 6 pages 240 and 241

An insurer which otherwise qualifies therefor may be authorized to transact any one kind or combination of kinds of insurance . . . except:

(1) A life insurer shall be authorized to transact in addition only disability insurance; . . .

(2) A reciprocal insurer shall not transact life insurance.

(3) A title insurer shall be a stock insurer.

Ark. Stats. 66-3020, Vol. 6, page 336

(1) Any insurer may retain, invest in or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition or common management is inconsistent with any other provision of this code, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business or tend to create a monopoly therein.

(2) Any person otherwise qualified may be a director of two (2) or more insurers which are competitors, unless the effect thereof is to lessen substantially competition between insurers generally or tends materially to create a monopoly.

Ark. Stats. 66-4101, Vol. 6, page 447

(1) Upon compliance with the provision of this code, a surety insurer may become surety upon any bond or other contract of any person and may become surety upon any bond required to be given by any person in the course of judicial proceedings, or upon the bonds of administrators, executors, guardians, receivers, assignees, trustees or other fiduciary required to give such bond; . . .

Ark. Stats. 85-3-302, Vol. 7C, page 155

(1) A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holde rin due course.

(3) A holder does not become a holder in due course of an instrument:

(a) by purchase of it at judicial sale or by taking it under legal process; or

(b) by acquiring it in taking over an estate; or

(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

(Comments to Uniform Commercial Code following the above section and beginning on page 156 of Vol. 7C, with respect to subparagraph (3) of such section is set out as follows:

(3. Subsection (3) is intended to state existing case law. It covers a few situations in which the purchaser takes the instrument under unusual circumstances which indicate that he is merely a successor in interest to the prior holder and can acquire no better

rights. (If such prior holder was himself a holder in due course, the purchaser succeeds to that status under Section 3-201 on Transfer.) The provision to a purchaser at an execution sale, a sale in bankruptcy or a sale by state bank commissioner of the assets of an insolvent ban. It applies equally to an attaching creditor or any other person who acquires the instrument by legal process, even under an antecedent claim; and equally to a representative, such as an executor, administrator, receiver or assignee for the benefit of creditors, who takes over the instrument as part of an estate, even though he is representing antecedent creditors.)

Ark. Stats. 85-3-306, Vol. 7C page 161

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the pary of any person: and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defneses of want or failure of consideration, non-performance of any condition precedent, nondelivery, or delivery for a special purpose (Section 3-408 (85-3-408)); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

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NO. 1310

IN THE

Supreme Court of the United States

October Term, 1970

LEE EDWARDS ..... *Petitioner*

v.

LEM C. BRYAN, RECEIVER FOR ARKANSAS LOAN AND THRIFT CORPORATION ..... *Respondent*
HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, AND CHARLES R. GARNER, parties to original District Court action, and parties to companion cases in Circuit Court of Appeals for the Eighth Circuit, consolidated therein for trial ..... *Respondents*

SUPPLEMENT TO APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FINES F. BATCHELOR, JR.
411 Main (P. O. Drawer L)
Van Buren, Arkansas 72956
Telephone: (501) 474-6371
Attorney for Petitioner

YOES PTG. & LITHO. FORT SMITH, ARKANSAS

EXHIBIT F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19815. LEM B. BRYAN, etc., *Appellee,* vs.
HOYT BORUM, et al, *Appellants.*

No. 19875. LEM C. BRYAN, etc., *Appellant,* vs.
GAYLORD B. ROBERSON, *Appellee.*

No. 19876. LEM C. BRYAN, etc., *Appellant,* vs.
PAUL A. MICHLER, *Appellee.*

No. 19877. LEM C. BRYAN, etc., *Appellant,* vs.
LEE EDWARDS, *Appellee.*

No. 19878. LEM C. BRYAN, etc., *Appellant,* vs.
RALPH C. INGRAM, *Appellee.*

No. 19879. LEM C. BRYAN, etc., *Appellant,* vs.
JOE D. JERYO, *Appellee.*

No. 19880. LEM C. BRYAN, etc., *Appellant,* vs.
CHARLES GARNER, *Appellee.*

Appeals from the United States District Court for the Western District of Arkansas.

Petition for rehearing en banc filed by certain appellants and appellees in the above cases having been considered, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing, together with the petitions for rehearing filed by appellees in 19877 and 19880 be, and they are hereby, denied.

It is further ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that petition for writ of certiorari and record has been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

January 8, 1971

EXHIBIT G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

No. 19875
LEM C. BRYAN, RECEIVER, etc., *Appellant,*
vs.
HOYT BORUM, et al
GAYLORD B. ROBERSON, *Appellee,* et al.
No. 19876
LEM C. BRYAN, RECEIVER, etc., *Appellant,*
vs.
HOYT BORUM, et al
PAUL A. MICHLER, *Appellee,* et al.
No. 19877
LEM C. BRYAN, RECEIVER, etc. *Appellant,*
vs.
HOYT BORUM, et al
LEE EDWARDS, *Appellee,* et al.
No. 19878
LEM C. BRYAN, RECEIVER, etc., *Appellant,*
vs.
HOYT BORUM, et al
RALPH C. INGRAM, *Appellee,* et al.
No. 19879
LEM C. BRYAN, RECEIVER, etc., *Appellant,*
vs.

Appeals from the United States District Court for the Western District of Arkansas.

HOYT BORUM, et al)
JOE D. JERYO, *Appellee,* et al.)
No. 19880)
LEM C. BRYAN, RECEIVER, etc.,)
Appellant,)
vs.)
HOYT BORUM, et al)
CHARLES GARNER, *Appellee,* et al.)

On Consideration of the motion of appellees for a further stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a further period until February 15, 1971, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the further stay hereby granted shall continue until the final disposition of these cases by the Supreme Court.

February 4, 1971

EXHIBIT H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

No. 19815

LEM C. BRYAN, RECEIVER, etc., *Appellee,*

vs.

HOYT BORUM, AFTON BOLUM, E. M. CLEM, *Appellants,*

GAYLORD B. ROBERSON, et al., ERNEST A. BARTLETT, JR., *Appellant,*

JOE D. JERYO, et al.

Appeal from the United States District Court for the Western District of Arkansas.

On Consideration of the motion of appellee for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a further period until February 15, 1971, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the further stay hereby granted shall continue until the final disposition of this case by the Supreme Court.

February 5, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1310

LEE EDWARDS,
Petitioner,

v.

LEM C. BRYAN, Receiver for Arkansas Loan and Thrift Corporation,
Respondent,

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, and CHARLES R. GARNER, Parties to Original District Court Action, and Parties to Companion Cases in Circuit Court of Appeals for the Eighth Circuit, Consolidated Therein for Trial,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN H. FITZHUGH
522 Merchants National Bank Building
Fort Smith, Arkansas

W. B. PUTMAN
P. O. Box 477
Fayetteville, Arkansas
Counsel for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1310

LEE EDWARDS,
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LEM C. BRYAN, Receiver for Arkansas Loan and Thrift Corporation,
Respondent,

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, and CHARLES R. GARNER, Parties to Original District Court Action, and Parties to Companion Cases in Circuit Court of Appeals for the Eighth Circuit, Consolidated Therein for Trial,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the holding of the United States Circuit Court of Appeals for the Eighth Circuit that the substantive law applicable to this case, an equity receivership, is the "federal common law," is in conflict with the laws of Arkansas, the decisions of this Court, the United States statutory law, and the decisions of the Fifth and Ninth Circuits.

Whether the holding of the United States Court of Appeals for the Eighth Circuit vacating the judgment of the United States District Court for the Western District of Arkansas in favor of the Petitioner and directing that judgment be entered for the Respondent against the Petitioner is violative of the Petitioner's right to a trial by jury under Amendment VII to the Constitution of the United States and a deprivation of property without due process of law under Amendment V to the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

These are adequately set forth in the Petition with the exception of 18 U.S.C. 1911 set forth at page 9 of this brief and Ark. Stat. Ann., Sec. 85-1-103 (Add. 1961) set forth at page 6 of this brief.

STATEMENT OF THE CASE

This suit was filed by Lem C. Bryan, Receiver of Arkansas Loan and Thrift Corporation (hereafter AL&T), against the Petitioner and other named defendants seeking judgment on certain promissory notes executed by them in favor of AL&T, each in the amount of $70,400.00.

The Petitioner, along with the other named defendants, denied liability pleading failure of consideration, lack of delivery, the statute of frauds, and that the Respondent was not a holder of the notes. The Respondent alleged the Petitioner and the other named defendants had executed the notes for the purpose of deceiving the Insurance Commissioner of the State of Arkansas, and that they were estopped to deny their liability.

The Respondent would add to the statement of the facts contained in the Petition at page 5 the facts surrounding the investigation of both AL&T and Savings Guaranty Corporation (hereafter SGC) by the Insurance Commissioner of the State of Arkansas (hereafter Commissioner). In June of 1967, the Commisioner became concerned about the solvency of SGC and the possibility that there was such an interlocking ownership between AL&T and SGC that AL&T was in fact insuring its own deposits. He summoned the officers of the corporation to a hearing which was held on August 9, 1967. Four of the original defendants, the Petitioner not included, attended the hearing where it was stated by them that with the exception of 301 shares, the majority of the stock in SGC was held by its officers and directors. A memorandum on the letterhead of SGC was introduced in evidence at the hearing showing that each of the defendants below, including the Petitioner, was the owner of sixty-five shares of stock. It should also be noted that the stock records of SGC showed the Petitioner and his codefendants as owners of the shares in question.

The notes in question are all dated June 15, 1967, and are all admittedly signed by the defendants in this case, including the Petitioner. The notes all had attached to them a stock certificate for sixty-four shares of SGC stock, and except for the Petitioner herein, the endorsement on the back of the stock certificates are conceded to be genu-

ine. The notes are payable to AL&T and each recites that it is secured by sixty-four shares of the stock of SGC.

Further facts are as stated in the Petition at pages 5-12, and with the exception of the latter portion of paragraph 6, at page 8 of the Petition (which should be disregarded as argumentative and irrelevant) adequately sets forth the balance of the circumstances surrounding this litigation.

ARGUMENT

The Ultimate Result in This Litigation Will Be Unchanged Whether Federal Common Law or Arkansas Substantive Law Be Applied.

Regardless of the validity of the Petitioner's argument that there is no federal common law, this case would be decided in precisely the same manner whether the federal common law or Arkansas substantive law be applied. No matter what name be given the particular theory, estoppel or some form of implied consideration, the Arkansas Court has consistently required payment of such notes as these on the basis of the fiduciary relation of the maker and the payee. **Blanks v. American Southern Trust Co.**, 177 Ark. 832, 9 S.W.2d 310 (1928) found such a fiduciary relation and estopped the maker from asserting defenses on the note saying:

> . . . it was his duty as a director not to entertain such a promise and act upon it to the detriment of his bank.

There, a condition precedent to payment, similar to that argued by the Petitioner herein, was present and was not allowed as a defense. The court regarded the interlocking directorates of the bank and the borrowing company as an important element in their consideration. **Ellis v. Jonesboro Trust Co.**, 179 Ark. 615, 17 S.W.2d 324 (1929) found an implied consideration in order to hold the defendant liable on a note. These cases clearly support the finding of the United States Court of Appeals for the Eighth Circuit, set forth at page 19a of the Petition, that the decision reached was not in conflict with Arkansas law.

Further, the Petitioner's argument at page 25 of the Petition that the Uniform Commercial Code as adopted

in Arkansas supersedes the disallowance of the asserted defenses since the Respondent was not a holder is overcome by Ark. Stat. Ann. Sec. 85-1-103 (Add. 1961). This section reads as follows:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating clause shall supplement its provisions.

Clearly this would allow the affirmative application of the estoppel doctrine to bar any assertion of those defenses allowed by the code sections relied upon by the Petitioner. The Petitioner can cite no cases arguing that the sections relied upon by him preempt the application of the equitable doctrine of estoppel for the reason that there are none. Further, there is no indication by either the code or the comments contained therein and cited by Petitioner that such a situation as this is governed by those sections. It is Respondent's contention that Ark. Stat. Ann. Sec. 85-1-103 (Add. 1961) clearly allows the application of the estoppel doctrine to this case.

The Petitioner further argues that, under Arkansas law, the Respondent as receiver for AL&T was not a holder in due course and can therefore stand in no better position than AL&T. The Respondent does not argue that he is or is not a holder for the reasons already stated. Such is not material or relevant to the questions before this Court. The sole question is the application of the estoppel doctrine to preclude the Petitioner from asserting certain defenses on a note admittedly signed by him. On this question the law is settled in Arkansas, **Blanks v. American Southern Trust Co.**, *supra*, and was found to be the same under the federal common law per the deci-

sion of the United States Court of Appeals for the Eighth Circuit, contained at page 19a of the Petition.

Thus Arkansas law does permit the application of the estoppel doctrine on these facts, and as such, a decision by this Court that the federal common law does not apply would not affect the ultimate result of this case. Where the question presented has no bearing on the ultimate outcome of the case, this Court has declined to grant certiorari. **Sommerville v. United States**, 324 F.2d 712 (3d Cir. 1963), cert. den. 376 U.S. 909 (1964).

The Holding of the United States Court of Appeals for the Eighth Circuit That the Substantive Law Applicable to This Case, an Equity Receivership, Is the Federal Common Law, Is Not in Conflict With the Decisions of This Court, the United States Statutory Law, or the Decisions of the Fifth and Ninth Circuits.

The Petitioner contends that the United States Court of Appeals for the Eighth Circuit has placed itself into conflict with the decisions of this Court and decisions of the Fifth and Ninth Circuits by holding that the federal common law still exists and is applicable to the facts of this case. But the primary case relied upon by the Petitioner, **Erie R. Co. v. Tompkins**, 304 U.S. 364 (1938), did not decree an end to all federal common law. Since the decision in **Erie R. Co. v. Tompkins**, *supra*, this Court has declared often that there is still a federal common law in the absence of specific federal statutes in point. **D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.**, 315 U.S. 447 (1942), finds a federal common law governing federal rights. **Clearfield Trust Co. v. United States**, 318 U.S. 363 (1943), specifically states that the **Erie Doctrine** does not apply where the rights and duties of the United States on commercial paper which it issues are involved. Jurisdiction in the Federal District Court in **Clearfield Trust**

Co. v. United States, *supra*, was pursuant to 28 U.S.C. 41(1), but the cause of action was on the "express guaranty of prior endorsements made by the Clearfield Trust Co." The rule to be derived from these cases is that where Congress has acted to allow jurisdiction without regard to either diversity or amount in controversy, such an action indicates a federal interest in the subject matter being regulated. See **Sommerville v. United States**, *supra*. In proper cases, federal general law (common law) will be allowed to fill the gaps in the regulatory and jurisdictional statutes. This has been the result in matter involving the administration of federal labor relations law (affecting interstate commerce) as in **Textile Workers v. Lincoln Mills**, 353 U.S. 448 (1957), and the application of the Federal Bankruptcy Act in **Vanston Bondholders Protective Commission v. Green**, 329 U. S. 156 (1946). Still more instances may be found in R. Leflar, **American Conflicts Law**, Sec. 67 (1968).

Respondent contends that the facts of this case warrant the application of a federal common law. The case arises under 15 U.S.C. 77t(b), 77v(a), 77e(a) and 77q(a) with the receiver being appointed pursuant to the powers authorized in 15 U.S.C. 77t. See **Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission**, 285 F.2d 162 (9th Cir. 1960), cert. den. 366 U.S. 919 annotated at 15 U.S.C.A. 77t(b), number 25. The specific sections of the Securities and Exchange Commission Act under which this receivership arose exemplify Congressional concern with the trading of securities. Through their Commerce power, Congress has expressed its desire and intent to regulate and control to the extent necessary to assure adequate safeguards for nationwide investors. It would seem anomalous indeed to impose federal regulations on the trading in the company's securities and the company's adequate registration yet fail to control portions of that trading and registration by federal law. The

interstate aspects of AL&T are clear. A solely local defense concerning the assets of a company in federal receivership, such receivership resulting from violations of and authorized by a federal law, would greatly diminish the effects of such law and would dilute the protection given to such interstate investors. See **Sommerville v. United States**, *supra*. Are we to look to one law to appoint a receiver and still another to determine defenses on actions arising out of such a receivership? Hopefully, this Court will follow its decision in **D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.**, *supra*, and **Clearfield Trust Co. v. United States**, *supra*. Here there is a federal right arising from a federal law. Where the federal law is lacking, a federal common law should be applied.

The Petitioner also argues that Congress has spoken on this subject in 28 U.S.C. 959. However, the intent of this Act is readily inferred from the annotations in 28 U.S.C.A. 959(b) and those in 19 U.S.C.A. 1911. 18 U.S.C. 1911, pertaining to a receiver mismanaging property is set forth below.

> Whoever, being a receiver, trustee, or manager in possession of any property in any cause pending in any court of the United States, willfully fails to manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof, shall be fined not more than $3,000.00 or imprisoned not more than one year, or both.

The purpose is to establish the duties of a receiver, be he appointed by a federal court or a state court. 28 U.S.C. 959(b) places the duty upon the receiver to manage and operate such property in his possession according to the laws of the state, and 18 U.S.C. 1911 establishes his liabil-

ity for failure to do so. These sections do not determine what law is to govern transactions occurring prior to receivership or subsequent thereto that do not relate specifically to his liabilities and affirmative duties as a receiver. The litigation herein nowhere concerns the duties or liabilities of the receiver and Respondent nor does it arise from his duties or liabilities. Congress has not yet spoken upon this question.

However, as previously noted, even should state law be required to govern, there is no argument but that the Arkansas law relative to such an action would allow the recovery by the Respondent. **Blanks v. American Southern Trust Co.**, *supra.*

Further, the two cases asserted to be in conflict with the Eighth Circuit, **Helene Curtis Industries, Inc. v. Pruitt,** 385 F.2d 841 (5th Cir. 1967) and **Riess v. C. W. Murchison,** 384 F.2d 727 (9th Cir. 1967) are not appropriate counterargument to the Respondent's contentions. These cases do follow **Erie R. Co. v. Tompkins**, *supra*, but they were diversity actions and not therefore relevant for your consideration.

The Holding of the United States Court of Appeals for the Eighth Circuit Vacating the Judgment of the United States District Court for the Western District of Arkansas in Favor of Petitioner and Directing That Judgment Be Entered for the Respondent Against the Petitioner Does Not Violate the Petitioner's Right to a Trial by Jury Under Amendment VII to the Constitution of the United States Nor Does It Deprive Him of His Property Without Due Process of Law Under Amendment V to the Constitution of the United States.

Since **Galloway v. United States**, 319 U.S. 372 (1942), there has been little doubt that a Circuit Court of Ap-

peals may overturn a jury verdict and judgment entered thereon and direct that judgment be entered contra to such jury verdict and judgment without violating any Constitutional guarantees. See also **Brady v. Southern Ry. Co.**, 320 U.S. 476, 479-480 (1943). This court in **Galloway v. United States**, *supra*, at 389 said:

> If the intention is to claim generally that the Amendment (Amendment VII to the Constitution of the United States), deprives the federal courts of the power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.

Here the directed verdict is sought by the party having the burden of persuasion and proof, but the Respondent contends that this, in the light of the facts herein, presents no Constitutional obstacle to the Eight Circuit order.

The test formulated and followed by most state and federal courts is that set forth in **Helene Curtis Industries, Inc. v. Pruitt**, *supra*, where at page 850 the test it:

> . . . a fact issue must be submitted to the jury if reasonable men could differ on the conclusions to be reached from the evidence presented.

The Petitioner argues that whether there was a "delivery" presented a fact question upon which reasonable men could differ and therefore it was improper for the Eighth Circuit to order that a judgment be entered against him in the light of the jury's verdict.

Both execution and delivery were admitted by the Petioner in his answer, and such is set forth in the Petition at page 9. The only question was whether the delivery of the notes to E. M. Clem was in fact a delivery to AL&T. Further, the Petitioner states that the delivery of the notes executed by the other defendants below was also

made to E. M. Clem. See Petition, page 8. The jury was instructed, over the objection of the Respondent, in Instruction Number 10 that:

> The plaintiff claims that each defendent is estopped to assert any defense to the plaintiff's right of recovery on any note executed by him. You are instructed that the doctrine of estoppel precludes one under certain circumstances from asserting a defense to the right of another to recover from him, and if you find from a preponderance of the evidence that each of the defendants intended to purchase stock of Savings Guaranty Corporation from Arkansas Loan and Thrift Corporation and pursuant to such intention executed the notes here sued on with intention that the transaction be consummated at some future date and that **these notes were delivered to Arkansas Loan and Thrift Corporation** and certain stock certificates of Savings Guaranty Corporation were issued in the name of each of the defendants; and you further find that on the basis of such transactions any agent, employee, officer, or director of either Arkansas Loan and Thrift Corporation or Savings Guaranty Corporation (in the course of an official investigation by the Arkansas Commissioner of Insurance as to whether Savings Guaranty Corporation was in compliance with the law) represented to the Commissioner of Insurance that each of the defendants was the owner of a certain specified number of shares of stock of Savings Guaranty Corporation, each defendant intended to purchase, then you are instructed that each of the defendants is estopped to assert any defense to the payment of any such note executed by him (emphasis added).

The instruction includes several elements necessary in order for the jury to find in favor of the receiver, Respondent herein, against any one of the defendants. But among

these elements is one common element, a common denominator so to speak, applicable to all defendants including the Petitioner. That is the requirement for delivery. The District Court jury entered a verdict against four of the defendants and in favor of six of the defendants. See Petition, page 7a. All ten defendants admitted execution of the note and delivery of the note to E. M. Clem. Clearly if delivery was the one element common to all ten, the jury's verdict against even one of the defendants necessarily implies a finding of the requisite delivery as to all. And, as set forth in the Eighth Circuit opinion, Petition page 19a, there was more than adequate evidence to support the finding that E. M. Clem was in fact and in law a director of AL&T at the time the note was executed and delivered to him by the petitioner.

The Petitioner's contention that there was no delivery as a matter of law is clearly obviated by the Petitioner's own argument, where at page 21 of the Petition, he asserts that "the possession by an agent of something belonging to his principal, would be the possession of the principal and not some third person." The Eighth Circuit opinion, at page 20a of the Petition, fully endorses this contention. Nor do we contend that a person cannot be an agent for more than one person at the same time. But the Petitioner's argument overlooks the obvious conclusion. That E. M. Clem was the agent of the petitioner is not disputed, but he was also the agent of AL&T and as such held these notes for that principal subject to the condition precedent specified in the testimony and argument of the Petitioner. Again, **Blanks v. American Southern Trust Co.**, *supra*, will not allow the assertion of such a condition precedent under circumstances as these to defeat recovery.

The Respondent further contends that in the light of the cited cases concerning estoppel, the delivery was not required. Delivery of the notes by itself, even construc-

tive delivery, is not a required element of estoppel. It would have been enough if the makers as directors or officers of AL&T or its intimate subsidiary, had simply kept the notes as part of some plan beneficial to the business and indirectly to them, so long as there was any way by which their companies or the public could suffer in the long run as a result of the making of the notes. This last proviso is merely another way of desribing the breach of fiduciary responsibility which the cases have penalized. Allowing the books of SGC to reflect the stock purchase would meet this test and would estop the makers from denying delivery.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

JOHN H. FITZHUGH
522 Merchants National Bank Building
Fort Smith, Arkansas

W. B. PUTMAN
P. O. Box 477
Fayetteville, Arkansas
Counsel for Respondent

March 29, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1310

LEE EDWARDS,
Petitioner,

vs.

LEM C. BRYAN, Receiver for Arkansas Loan and Thrift Corporation,
Respondent,

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, and CHARLES R. GARNER, Parties to Original District Court Action, and Parties to Companion Cases in Circuit Court of Appeals for the Eighth Circuit, Consolidated Therein for Trial,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT, GARNER, IN SUPPORT

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the holding of the Court of Appeals for the Eighth Circuit that "federal common law" or "federal rules of decision" should be applied to this case is inconsistent with the decisions of other Courts of Appeals and this Court.

Whether Arkansas law, if applicable, affords petitioner and respondents, other than Bryan, a defense where the note involved is conceded to be without consideration.

STATUTES INVOLVED

These are adequately set forth in the petition but this respondent would add:

28 U. S. Code Sec. 1254.

STATEMENT OF THE CASE

The facts set forth in the petition are adequate to acquaint the Court with the circumstances of this litigation. This respondent would add that the Court of Appeals treated him, although in the capacity of an attorney to the corporations, with the same fiduciary duty as the other directors and thus estopped to assert all defenses denied the directors. App. 30a.

ARGUMENT

The Court of Appeals for the Eighth Circuit in Deciding That the "Federal Common Law" or "Federal Rules of Decision" Should Govern a State Created Interest, or Right, Growing Out of a General Equity Receivership in Federal Court Is Inconsistent with Decisions of the Second and Ninth Circuits and This Court.

A. Applicable Law.

The Eighth Circuit misapprehended the law in failing to distinguish the present case concerning state created rights under a general equity receivership instituted in Federal Court from a case where the receivership originates by reason of a federal statute to protect a Federal interest. The Securities and Exchange Act of 1933 does not provide for appointment of a receiver and this receivership rests upon the general equitable jurisdiction of the Federal Court. It is not one arising as a Federal statutory receivership. Even though jurisdiction is not based upon diversity of citizenship this does not mean that Federal common law is to be applied to the exclusion of the forum state's law where private rights are involved.

The Second Circuit stated this position in *Austrian* v. *Williams*, (CA 2 1952) 198 F. 2d 697, cert. den. 340 U.S. 909 (1952) as follows:

> "The fact that diversity jurisdiction is lacking does not, alone, preclude a result of that which could be reached if there were such jurisdiction. Though it may be true that the rationale of *Guaranty Trust Co.* v. *York*, 326 U.S. 29 (1945) and *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) is inapplicable where a federal interest is involved, *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447; *Clearfield Trust Co.* v. *U. S.*, 318 U.S. 363. . . . There may be other reasons to support, or require, the same result."

The "other reason" given in *Austrian, supra,* supporting the use of the forum state's law was the right to use the state's statute of limitations as a defense in a bankruptcy trustee's claim.

Likewise, in the present case, the "other reason" supporting the application of state law is a state created right to assert the defense of lack of consideration which is established as a valid defense under the law of Arkansas to an accommodation maker or endorser on a note where an equity receiver brings suit on a note of an insolvent bank. *Jordan* v. *Harris*, 98 Ark. 200, 135 S. W. 830 (1911).

It was conceded during the trial and on appeal that no consideration existed for the execution of the promissory note that provides the basis for the asserted liability of petitioner and respondents, except Bryan.

Further, in the absence of consideration and in the absence of misrepresentation by receiver's predecessor and reliance thereon Arkansas law would not estop petitioner and respondents, except Bryan, from raising lack of consideration as a defense on the note. *Traylor* v. *Farmers Bank & Trust Co.*, 196 Ark. 161, 116 S. W. 2d 590 (1938).

Thus, under Arkansas law, the defense is available to petitioner and respondents, except Bryan, and it is urged that this is the applicable law.

This Court in *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156 (1946) in Justice Frankfurter's concurrence said:

> ". . . a claim implies the existence of an obligation created by state law. If there was no valid claim before bankruptcy, there is no claim for bankruptcy to recognize or to reject.

> Where a transaction in its entirety occurs in one state, it is clearly the law of that state that determines if an obligation is born whether the question becomes relevant in bankruptcy court or in any other court."

B. Consequences.

If the decision of the Eighth Circuit stands the receiver will be put in a better position than was his predecessor since the predecessor corporation was subject to the defense of lack of consideration.

This position is untenable in view of *Vanston, supra,* and the decision of the Ninth Circuit in *Equitable Trust Co.* v. *Great Shoshone & TFWP Co.*, 245 Fed. 697. There it was said:

> ". . . the appointment of a receiver of the property by a federal court is for the protection and preservation of all rights and interests therein existing at the time of the appointment."

By the terms of the appointment, App. 3a, the receiver could have sued in either state or federal court. Under the decision of the Eighth Circuit the receiver's decision to sue in Federal court has elicited a decision exactly opposite that which would have been predictably reached if he had sued in state court. In addition to undermining uniformity of results this decision placed the existence of state created rights at the very whim of the receiver.

CONCLUSION

The decision of the Eighth Circuit should be reviewed in this Court and the petition for certiorari should be granted.

Respectfully submitted,

E. J. BALL AND JAMES W. GALLMAN
P. O. Box 567
Fayetteville, Arkansas 72701

BRADLEY D. JESSON
Rogers Avenue at 16th Street
Fort Smith, Arkansas 72901
Attorneys for Respondent Garner